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COURT OF APPEALS
DIVISION II

2015 JAN -6 AM 11:57

STATE OF WASHINGTON

BY _____
DEPUTY

Court of Appeals No. 46321-1-II

IN THE WASHINGTON COURT OF APPEALS
DIVISION TWO

DEBORAH DESPAIN,

Plaintiff/Respondent,

v.

ESTATE OF GEORGE LUND, JR., DUANE LUND; JOHN DOES 1-10.

Defendants/Appellants.

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STATE OF WASHINGTON
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BRIEF OF RESPONDENT DEBORAH KELLOGG

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ORIGINAL

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I. INTRODUCTION

The trial of this matter occurred on March 18, 2014, with full notice to the Appellants, and after several continuances. On the morning of the trial, trial counsel for Appellants orally moved for yet another continuance, citing a client report of illness. After hearing argument, the trial court denied the continuance, but allowed the absent client to listen to the testimony by telephone, and to arrange to testify at trial by telephone. Neither occurred. At the close of plaintiff's case at the lunch recess, the trial court inquired as to whether the defense would present a case that afternoon. Counsel for Appellants reported that she had not heard from the absent client that day, and repeated that information after lunch. Thereafter, the court heard closing arguments. There was no error.

II. RESPONSE TO ASSIGNMENTS OF ERROR

Respondent Deborah Kellogg (f/k/a Deborah DeSpain) responds to the Appellants' assignments of error as follows:

1. The Findings of Fact entered by the trial court were based on the testimony of multiple witnesses presented by Ms. Kellogg, who were cross-examined by Appellants' counsel. Appellants presented no evidence of their own.

The Findings of Fact were supported by substantial evidence.

2. Appellants' requests for another trial continuance and for bifurcation were not supported by anything other than the statements of trial counsel. The trial court did not abuse its discretion in denying both requests.
3. As with the Findings of Fact, the trial court's finding of a constructive trust was based on the cumulative testimony of Respondent's trial witnesses. That finding was supported by substantial evidence and was not error, especially as the Appellants did not present their own evidence at trial.
4. Appellants' motion for reconsideration was filed after the 10 days allowed under CR 59. While the Findings of Fact and Conclusions of Law were filed with the Clerk's Office on April 8, 2014, they were actually signed by the trial judge on April 7, 2014, and operative as of that date (Appellants' counsel had actual notice of the contents, which were unaltered by the trial court, no later than March 27, 2014).

III. ISSUES RAISED

1. Does the trial court commit reversible error when it makes Findings of Fact based upon the evidence presented at trial, which was unrebutted by Appellants?
2. Does the trial court abuse its discretion when it refuses to grant a trial continuance, bifurcation, or reconsideration, based upon notice of the trial date and the participation at trial of counsel for Appellants, when there was no actual evidence in the record at the time of trial to support the claim of illness or possible surgery?
3. Does the trial court commit reversible error when it finds the existence of evidence supporting a constructive trust (which evidence Appellants admit is valid) at trial, and which was unrebutted by Appellants?
4. Does the trial court abuse its discretion when it refuses to grant reconsideration under CR 59(b), when the evidence used to support the motion was available to Appellants prior to trial (except for that evidence most likely fabricated), it was not introduced at trial, and the order which Appellants appeal from was signed by the trial court outside of the ten-day window allowed under the

rule, when the contents were already known by Appellants' counsel?

IV. STATEMENT OF THE CASE

A. SUBSTANTIVE FACTS

This action follows the death of the two parents of three siblings (Deborah Kellogg, Diane Swogger, and Duane Lund), all current or former litigants regarding the intent of their parents in splitting land equally between the children. CP 165. A previous action occurred in Cowlitz County Superior Court, Cause No. 06-2-01064-8, brought by Ms. Swogger against her brother, Mr. Lund. CP 166. Ms. Swogger obtained a court order quieting title in some of the land. CP 166, RP 95.

This action was filed on January 22, 2009. CP 3. Ms. Kellogg (Respondent here) sought essentially the same relief as that obtained by her sister in the previous action. CP 5-6. Ms. Kellogg's legal theories are adverse possession and constructive trust. *Id.* The named defendants are the Estate of George Lund, Jr. and Duane Lund (Appellants here). CP 3-4. It is undisputed that Duane Lund, both in his personal actions and his pleadings, claims the entirety of the remaining land devised by his parents, to the exclusion of Ms. Kellogg. *See* Complaint, ¶¶ 4.4 – 4.7, 4.10,

5.2 – 5.4, CP 4-6; Amended Answer, ¶¶ 4.4 – 4.7, 4.10, 5.2 – 5.4, CP 28-32.

B. PROCEDURAL FACTS

As noted by Appellants, trial of this matter was continued several times before the actual trial on March 18, 2014. Brief of Appellants at 6. The March 18 trial date had been set the summer before, on June 12, 2013. CP 157-58. Appellants were fully apprised of the trial date, as their counsel submitted a trial memorandum. CP 170-77. Contemporaneously with the trial memorandum, Appellants also submitted the motion to continue the March 18 trial date, supported only by the hearsay statements of trial counsel. CP 178-80. The motion for continuance was heard first on March 18. RP 4-7. Thereafter, a written order was entered. CP 181.

Notably, the trial court examined the issue of whether a continuance should be granted and very explicitly set forth its reasoning for denying the motion:

> JUDGE EVANS: . . . So, as far as the motion to continue, at this point, I don't have any information before me that tells me that Mr. Lund's condition is emergent. There's nothing to tell me that his life's at risk. There's nothing to tell me that he couldn't sit in a chair and maybe we could lean it back so he's more comfortable, nothing to suggest that he couldn't be

here. And the reason I say that is that, apparently this was known to him last week, probably Thursday or Friday of last week. It's been an entire week from then until this scheduled surgery date. Obviously, if somebody needs surgery, there's something wrong, but my understanding with hernias, unless there is, you know, some -- some -- something seriously wrong, they'll get them right in, but if not, then it's basically discomfort and pain that people are experiencing when they experience a hernia. Having never experienced that, I -- I don't know what that's like, but as far as the continuation of the trial, the case is old, this is the date that's been set, the day has been set for quite some time, so I will deny the motion to continue the trial. I will grant, I think it's proper to allow Mr. Lund to listen in and participate in the proceedings and via phone if the -- the parties want to do that. We can make arrangements. Ms. Lovejoy, if you have his phone number, we -- you could call him, and we could arrange that prior to beginning. We just need -- probably just need a few moments to get that set up, but I'm not -- I don't have any objection to that. He can listen in and just press his mute -- his mute button, and so he could listen in and then certainly during any breaks you would be free to converse with him. So -- so we should probably take a break now, to allow him to get on the phone, is -- is my sense. So, do you -- do you have his contact information that you could -- ?

MS. LOVEJOY: Yes, I can get a hold of him. And then I wondered, I did prepare an order that would be appropriate for you --

JUDGE EVANS: Sure, for the motion to continue?

MS. LOVEJOY: Okay. And then if we could take a break, then I can contact him and talk to him if that would be alright?

JUDGE EVANS: Yeah, that would be great. And if you just work with Ms. Lewis regarding just the phone setup. That would be great.

. . .

(Court recesses on this matter at 9:05:30 AM.)

(Court reconvenes on this matter at 9:23:36 AM.)
JUDGE EVANS: Okay. The clerk informs me that there was an attempt to contact Mr. Lund, message was left, and that's where we're at. That's right? Is that correct?
MS. LOVEJOY: That is where we're at, yes.

RP 4-7.

At this point in the trial, both parties presented opening statements, and then Respondent's counsel presented a total of 7 live witnesses – Twila Barbieri, Charmaine Baford, Jeff DeSpain, James Swogger, Denny Parkhill, Diane Swogger, and Deborah Kellogg. CP 230-32. Among other things, Ms. Kellogg testified that her brother, Duane Lund, did not tell her that her father had passed away, and had threatened her nephew with a firearm during the property dispute. RP 108. Several witness testified that Duane Lund refused to grant access to the property after the father's death. *See* Kellogg testimony, RP 107-08; Barbieri testimony, RP 22-24, 31-32, 37-38; Baford testimony, RP 42, 44-45; 47; J. Swogger testimony, RP 69-70, 74-75; Parkhill testimony, RP 85-86; D. Swogger testimony, RP 92-93.

The witnesses also testified that it was clearly the intent of the parents that all three children share their property in equal parts. *See* Barbieri testimony, RP 21, 26, 29; Baford testimony, RP

41, 45, 51; J. DeSpain testimony, RP 54, 56, 61-62; J. Swogger testimony, RP 65-66, 76; Parkhill testimony, RP 82; D. Swogger testimony, RP 93-94, 97-98; Kellogg testimony, RP 103-04, 106-07, 113, 116, Ex. No. 1.[1] Respondent also introduced previous deposition testimony of the father, George Lund, showing that numerous diaries had not been produced in discovery, and obtained admission of documents pursuant to Evidence Rule 904. RP 99-102, 120-22, CP 41-45.

After Respondent rested, the court inquired as to whether Appellants' counsel had had contact with her client. Receiving a negative answer, the court then inquired as to whether Appellants would be calling any trial witnesses. The answer was no. RP 122, 124. Respondent's counsel established on the record that Appellants had submitted no evidence at trial. RP 125-26.

At the conclusion of the trial, the court discussed with counsel various remedies. The court expressly found that the piece of land illustrated in Ex. No. 1 (and colored in yellow) was intended to go to Respondent per her parents' wishes. RP 141-42, 150. That exhibit was admitted at trial. RP 148-49.

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[1] *See* Supp. Designation of Clerk's Papers filed by Appellants dated October 23, 2014, relating to Trial Exhibit No. 1.

Presentation of the Findings of Fact and Conclusions of Law was set for March 24, 2014. RP 157-58. Appellants' counsel signed the Findings of Fact and Conclusions of Law on March 27, 2014, without objection. CP 188. The court entered the Findings of Fact and Conclusions of Law on April 7, 2014. CP 183-88.

On April 18, 2014, Appellants filed their motion for reconsideration of the Findings of Fact and Conclusions of Law (which also included a challenge to the court's denial of the trial continuance). CP 189, 190-93, 199-202. Appellant Duane Lund and his wife both filed declarations stating they had forgotten the March 18, 2014 trial date. CP 191, 200. Respondent opposed the motion for reconsideration, pointing out that the grounds for reconsideration were not met by Appellants, and that there were material inconsistencies regarding the alleged hernia condition of Duane Lund. CP 209-15, 216-22. The court denied the motion for reconsideration, both on timeliness and substantive grounds. CP 226-28. The court agreed there were substantial inconsistencies in the post-trial declaration testimony of Appellants, and the statements of their counsel at trial. CP 227.

Respondents appealed to Division Two on May 6, 2014. CP 225.

V. ARGUMENT

A. THE ABUSE OF DISCRETION STANDARD OF REVIEW APPLIES TO THIS MATTER

This appeal comes from the trial court's denial of a motion for reconsideration, which included its decision not to continue the trial. CP 225. Appeals from motions for reconsideration are reviewed under the abuse of discretion standard. *Lund v. Benham,* 109 Wn. App. 263, 266, 34 P.3d 902 (2001), *review denied*, 146 Wn.2d 1018 (2002). Appeals on denial of motions for continuance of a trial are also reviewed under the abuse of discretion standard. *Harris v. Drake*, 116 Wn. App. 261, 287, 65 P.3d 350 (2003), *affirmed* 152 Wn.2d 480 (2004).

> Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *MacKay v. MacKay*, 55 Wn.2d 344, 347 P.2d 1062 (1959); *State ex rel. Nielsen v. Superior Court*, 7 Wn.2d 562, 110 P.2d 645, 115 P.2d 142 (1941).

State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

1. Manifestly Unreasonable Prong

A "trial court abuses its discretion when its decision is arbitrary, manifestly unreasonable, or based upon untenable grounds." *Atwood v. Shanks*, 91 Wn. App. 404, 409, 958 P.2d 332,

review denied, 136 Wn.2d 1029, 972 P.2d 464 (1998); *see also* WASHINGTON APPELLATE PRACTICE DESKBOOK, §18.5, p. 18-6 (Wash. State Bar Assoc. 3d ed. 2005):

> The premise underlying the abuse of discretion standard is there is an acceptable range of decisions in a particular situation, and the appellate court will not reverse decisions that fall within that acceptable range even though the appellate judges might personally have decided the issue differently. Such decisions will be reversed only if they fall outside the acceptable range of possible decisions.

2. Exercised on Untenable Grounds

A decision based on a misapplication of the law rests on untenable grounds. The decision is based on untenable grounds if the factual findings are unsupported by the record. *Ryan v. State*, 112 Wn. App. 896, 899-900, 51 P.3d 175 (2002).

3. Exercised for Untenable Reasons

Discretion is abused only if exercised for untenable reasons. *Harris v. Drake*, *supra*, 116 Wn. App. at 287. The decision is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. *Ryan v. State*, *supra*, 112 Wn. App. at 899-900.

B. SUBSTANTIAL EVIDENCE SUPPORTS THE CHALLENGED FINDINGS OF FACT

The weakness of Appellants' case is shown in their first argument on appeal – that Findings of Fact 2, 3, and 9 are not

supported by substantial evidence. Appellants concede that evidence in the record does support Findings 2 and 3, and the content of Ex. No. 1. Brief of Appellants at 22. Appellants do not supply this Court with references to the applicable testimony, which includes Respondent's direct testimony (RP 103, 104, 105, 106, 107), cross examination testimony (RP 110, 113, 116), and the direct testimony of her former husband, Jeff DeSpain (RP 54, 55, 56) and his testimony on cross (RP 61, 62, 63). Mr. DeSpain also marked Ex. No. 1 on re-direct (RP 63, 64).

With regard to Finding No. 9, Appellants make the bare argument that there is no evidence relating to the idea Respondent's parents made a promise to give her the 2403 Mount Pleasant Road property. Brief of Appellants at 23. Because there is no description of the challenged trial testimony in this matter relating to this contention, or because this argument is underlaid by testimony that Appellants wished to give but did not because they were not in attendance at trial, Respondent is necessarily in the dark as to what the factual basis for this challenge to Finding No. 9 is about. It is clear, however, that the trial court was convinced by the totality of the trial evidence presented by Respondent. RP 141-42, 144, 150.

"Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." *Bering v. Share*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986), *cert. dismissed*, 479 U.S. 1050, 93 L. Ed. 2d 990, 107 S. Ct. 940 (1987). The record shows that Judge Evans, as the trier of fact, believed the testimony presented. It is undisputed that Appellants failed to present their own evidence. RP 124-25.

Accordingly, substantial evidence supports each of the challenged Findings. It is instructive that trial counsel for Appellants did not object to the Findings at the time of presentation to the trial court, CP 183-88, but did admit in open court that splitting the property into thirds in accordance with Ex. No. 1 was fair – "I can't make an argument with a straight face re -- regarding anything else, so." RP 134-35. There is no basis for reversing the trial court's findings.

C. THE MOTION FOR CONTINUANCE, MADE AT THE INCEPTION OF THE TRIAL, LACKED SUPPORTING EVIDENCE AND THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING IT

It is the proper function of the trial court to exercise its discretion in the control of litigation before it. *Doe v. Puget Sound*

Blood Center, 117 Wn.2d 772, 777, 819 P.2d 370 (1991). Trial judges have wide discretion to manage their courtrooms and conduct trials fairly, expeditiously, and impartially. *State v. Johnson*, 77 Wn.2d 423, 426, 462 P.2d 933 (1969); *In re Marriage of Zigler*, 154 Wn. App. 803, 815, 226 P.3d 202 (2010) (finding trial judge's decisions calculated to move the trial along, promote production of evidence, and encourage professionalism).

Here, it is undisputed that the very late motion for another continuance came the morning of trial, CP 178, and was only supported by the hearsay declaration of Appellants' trial counsel, CP 179-80. Janna Lovejoy did not testify that she had personal knowledge of Duane Lund's medical condition, ER 602, nor could she offer testimony as a necessary witness if she had personal knowledge. RPC 3.7(a). The trial court correctly noted that there was no evidence of an imminent medical emergency preventing the trial from proceeding. RP 4. Appellants themselves note the history of previous continuances in this action. Brief of Appellants at 6. It is undisputed that the complaint had been filed more than five years previously. CP 3.

Appellants heavily rely on the case of *Chamberlin v. Chamberlin*, 44 Wn.2d 689, 270 P.2d 464 (1954), for the

proposition that Judge Evans abused his discretion in denying the trial continuance based on a claim of illness, devoting no less than six pages of their brief to that case. Brief of Appellants at 24-30. In straining that hard to have this Court adopt the reasoning of *Chamberlin*, they miss the import of equally applicable cases pointing to the opposite conclusion.

Washington decisions unmistakably show that the trial court is allowed to weigh factors applicable to the case and make an appropriate decision. These include *Puget Sound Mach. Depot v. Brown Alaska Co.*, 42 Wash. 681, 682-83, 85 P. 671 (1906) (no abuse of discretion in denying fourth continuance when president of appellant company could not attend trial due to illness, holding "there must of necessity be some limitation on the extension of this courtesy and consideration"); *Traynor v. White*, 44 Wash. 560, 562, 87 P. 823 (1906) (no abuse of discretion in denying defendant's third motion to continue in a contract dispute); *Balandzich v. Demeroto*, 10 Wn. App. 718, 721, 519 P.2d 994 (1974) (viewed against the totality of the circumstances, trial court did not abuse its discretion in denying seventh continuance); and *Tucker v. Tucker*, 14 Wn. App. 454, 455, 542 P.2d 789 (1975) (no abuse of discretion in denying first motion for continuance made at beginning of trial;

leave to renew was granted, but motion not renewed before trial court). A mere four weeks ago, Division Two ruled that a criminal defendant absent from trial was not entitled to reversal of her conviction. *State v. Thurlby*, ___ Wn. App. ___, ___ P.3d ___, 2014 Wash. App. LEXIS 2857 (No. 44774-6-II, December 9, 2014, for publication). This case should be decided no differently.

D. SUFFICIENT EVIDENCE SUPPORTS THE TRIAL COURT'S FINDING OF A CONSTRUCTIVE TRUST

As with the challenged Findings of Fact described above, Appellants here concede that there exists an oral contract to devise property in favor of the three Lund children (including Respondent), including evidence "conclusively showed" at the trial that the "father and mother later specifically executed wills in compliance with the oral contract to devise," and that the trial court received "evidence that he intended to give her his home at 2403 Mt. Pleasant Road" (in reference to Ms. Kellogg), Brief of Appellants at 34-35, 36. Notably, Appellants do not cite to the record in making these admissions, nor in support of their argument that the trial court still committed error.

A constructive trust arises where a person holding title to property is subject to an equitable duty to convey it to another on

the ground that he would be unjustly enriched if he were permitted to retain it. *Baker v. Leonard*, 120 Wn.2d 538, 547-48, 843 P.2d 1050 (1993). Unless an equitable base is established by evidence of intent, there must be "some element of wrongdoing" in order to impose a constructive trust. *Id.*, 120 Wn.2d at 548 (citations omitted). Appellants do not address the "element of wrongdoing" prong of this analysis, which was amply demonstrated at trial through the testimony of witnesses as to Duane Lund's threats of violence, demeanor, and intent to isolate his father from his sisters and their husbands. *See*, *e.g.*, Kellogg testimony, RP 107-08; J. Swogger testimony, RP 69-70, 74-75; Parkhill testimony, RP 85-86; D. Swogger testimony, RP 92-93. The trial court correctly found that title to the property in question should be with Respondent. RP 150; CP 187-88.

Appellants apparently aim this part of the appeal at the trial court's decision to award property, specifically including the 2403 Mount Pleasant Road structure, to Respondent. This claim of error is based on the alleged absence of evidence that George Lund did "change his mind," Brief of Appellants at 37, which is flatly contradicted by Conclusions of Law Nos. 12 and 13, and the related Order, at No. 5, entered by the trial court on April 7, 2014.

CP 186-87. As addressed in other sections of this brief by Respondent, Appellants seek a "second bite at the apple" to contest the unrebutted evidence presented at trial by Respondent, and the findings and conclusions resulting from that evidence. Without a showing that the trial court improperly denied a trial continuance and denied reconsideration, there is no reason for this Court to give merit to Appellants' constructive trust arguments.

Lastly, Respondent addresses the evidentiary burden on a constructive trust claim. Respondent agrees that the standard is clear, cogent and convincing evidence. Clear, cogent, and convincing evidence exists when the ultimate fact in issue is shown by the evidence to be highly probable. *In re Dependency of K.R.*, 128 Wn.2d 129, 141, 904 P.2d 1132 (1995). The burden is intended to be difficult, but not impossible. *Cook v. Cook*, 80 Wn.2d 642, 645, 497 P.2d 584 (1972).

In this context, it is impossible to see how Respondent's proof at trial failed to meet the evidentiary burden. Respondent offered seven live witnesses, relevant deposition testimony of decedent George Lund, and the documents included in her ER 904 submission, plus Ex. No. 1. In contrast, Appellants did not appear at trial and gained admission of zero contrary testimony and zero

documentary exhibits. RP 124-25. The trial court reviewed and entered the Findings of Fact and Conclusions of Law shortly after the trial concluded. CP 183-88. Whether Appellants like it or not, all of the evidence admitted at trial supported the constructive trust claim. The clear, cogent and convincing standard was established as a matter of law. *See In re Marriage of Zigler*, *supra*, 154 Wn. App. at 815 ("Trials must be fair but they need not be perfect.").

E. THE MOTION FOR RECONSIDERATION WAS UNTIMELY AS A MATTER OF LAW, AND THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING IT

Civil Rule 59(b) provides:

> (b) Time for Motion; Contents of Motion. A motion for a new trial or for reconsideration **shall be filed not later than 10 days after the entry of the judgment, order, or other decision**. The motion shall be noted at the time it is filed, to be heard or otherwise considered within 30 days after the entry of the judgment, order, or other decision, unless the court directs otherwise. A motion for a new trial or for reconsideration shall identify the specific reasons in fact and law as to each ground on which the motion is based.

(Emphasis added.)

Appellants are correct that Respondent contends the 10-day timeframe for filing a motion for reconsideration began at the time the trial court signed the Findings of Fact and Conclusions of Law on April 7, 2014. Brief of Appellants at 38; CP 188; CP 189. Their

argument that the Motion for Reconsideration is timely is belied by several difficult problems.

First, the Washington Civil Rules are construed in the same manner as the state's statutes. The appellate court is to interpret a court rule as though it were enacted by the legislature, giving effect to its plain meaning as an expression of legislative intent. *In re Marriage of Tahat*, 182 Wn. App. 655, 670, 334 P.3d 1131 (2014). Specifically, the *Tahat* court held "that in a superior court bench trial, a litigant has 10 days from the date of the entry of formal findings of fact; conclusions of law; and a judgment, a decree, or another final order labeled as such to file a motion for reconsideration." *Id.*, 182 Wn. App. at 674-75 (*overruling Steinmetz v. Call Realty, Inc.*, 107 Wn. App. 307, 23 P.3d 1115 (2001), to the extent applicable to Rule 59 motions in superior court).

Second, if the statute is unambiguous, its meaning is to be derived from the language of the statute alone. *Food Services of America v. Royal Heights, Inc.*, 123 Wn.2d 779, 784-85, 871 P.2d 590 (1994). Using the plain meaning analysis, "not later than 10 days" in CR 59(b) means no later than April 17, 2014 on the facts of this case. This Court may judicially notice that April 7, 2014 was a Monday, and the ten days ran on the following Thursday, April 17,

2014. ER 201. Appellants chose to file their Motion for Reconsideration on Friday, April 18, 2014. CP 189.

Third, and decisively, the trial court correctly identified that the Motion for Reconsideration failed to "identify specific reasons in fact and law that form the basis of the Motion for Reconsideration." CP 227. The Motion itself is a single page, merely stating that it sought reconsideration of the trial court's March 18 order denying a trial continuance, and the "court's ruling, made April 18, 2014" [sic].[2] The motion stated that it relied on CR 59(a)(1), (5), (7), (8), and (9), and three post-trial declarations. CP 189. However, the trial court did address several issues in Appellants' reconsideration pleadings, including discrepancies in the contents of Duane Lund's reported medical condition, concluding that "Mr. Lund could have attended the trial had he so desired." CP 227. The other grounds under CR 59 were also addressed, and dismissed, by the trial court in its May 19, 2014 Order denying the Motion for Reconsideration. CP 227-28. These rulings were not erroneous as a matter of law. *Isla Verde International Holdings v. City of Camas*, 99 Wn. App. 127, 143, 990 P.2d 429 (1999) (affirming denial of reconsideration where

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[2] Respondent believes this reference to be to the April 7, 2014 Findings and Conclusions entered by the trial court.

evidence sought to be introduced could have been submitted earlier with minimal diligence by moving party).

Lastly, there is no real question that Appellants' trial counsel had actual notice of the contents of the Findings of Fact and Conclusions of Law even earlier, on Thursday, March 27, 2014. That day Ms. Lovejoy signed the Findings and Conclusions, followed by the date on which she signed. CP 188. There is no evident reason that the Motion for Reconsideration was not filed prior to April 18. Appellants do not set forth their reasons for waiting more than ten days, other than reliance on the Clerk's date stamp. Brief of Appellants at 39. Under *Tahat*, that reliance is fatal.

VI. CONCLUSION

For the reasons set forth above, the trial court should be affirmed *in toto*. No error of law and no abuse of discretion are demonstrated on this record.

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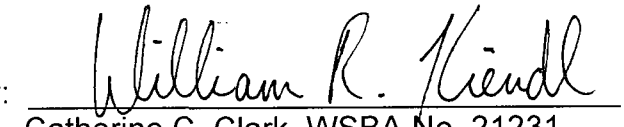
DATED this 5th day of January, 2015.

THE LAW OFFICE OF CATHERINE C. CLARK PLLC

By: 

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CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing document to be served upon the individuals below in the identified manner on this 5th day of January, 2015:

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